No. 21898

In the

United States Court of Appeals

For the Ninth Circuit

WILLIAM S. BENNETT,

Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of San Francisco National Bank,

Appellee.

Brief of Appellee Federal Deposit Insurance Corporation as Receiver of San Francisco National Bank

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PRELIMINARY STATEMENT

This appeal is from the order denying appellant's motion to set aside the judgment against him.

The only issue is whether the District Court abused its discretion by denying appellant's motion. We will show that there was no abuse of discretion.

The basic point is that appellant did not defend the action. Appellant was served with numerous documents throughout the more than one year of litigation in the District Court. He was represented by an attorney during

all of that time. But he did nothing about the suit until after judgment had been entered against him.

We will briefly relate the relevant facts of the litigation. We will then show that because of these facts the District Court properly exercised its discretion in denying appellant's motion to set aside the judgment. Finally, we will respond to appellant's arguments and will show that they do not establish any abuse of discretion.

JURISDICTION

The action was commenced in the United States District Court to recover assets in connection with the receivership and the winding up of the affairs of a national bank; transcript pp. 1-2. The District Court had jurisdiction under 12 U.S.C. § 1819, 28 U.S.C. § 1331, and 28 U.S.C. §§ 1345-1348.

This appeal is from the order of the District Court denying appellant's motion under Rule 60 (b) of the Federal Rules of Civil Procedure; transcript p. 108. An order denying relief under Rule 60 (b) is an appealable order, Vol. 7, Moore, Federal Practice, p. 341. This court has appellate jurisdiction over orders of the District Court; 28 U.S.C. § 1291.

FACTS

The towering fact is that appellant, although represented by an attorney, took no steps to defend this litigation. In order to demonstrate appellant's lack of concern for the action, we must briefly relate the events:

Federal Deposit Insurance Corporation is the receiver of the closed San Francisco National Bank.[1]

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1. Tr. 2. (In this brief Federal Deposit Insurance Corporation in its capacity as the receiver of the bank will simply be called "FDIC").

In August, 1965, FDIC filed its complaint against appellant and others.[2] FDIC alleged that appellant had executed continuing guaranties of the notes of the other defendants.[3] The complaint asked for judgment against appellant for the full amount of those unpaid notes.[4] The complaint was served in November, 1965.[5]

Appellant has never answered that complaint.

In July, 1966, appellant was in default. FDIC could have taken appellant's default and entered a default judgment against him. Instead, FDIC moved for summary judgment against all defendants. On July 29 it filed and served the motion and supporting documents.[6] Appellant admits that the motion for summary judgment was "duly served upon [appellant] through his counsel of record."[7]

Appellant filed no opposition to the summary judgment motion.

On September 9, 1966, the District Court entered its order granting the summary judgment.[8] This order was served on appellant on September 19, 1966.[9] On that date appellant was also served with the proposed form of judgment and an affidavit regarding the attorneys' fees which FDIC requested.

Appellant made no reply to the order, the proposed form of judgment, or the affidavit.

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2. Tr. 1.
3. Tr. 12-13, 21, 22.
4. Tr. 13-14.
5. Tr. 115.
6. Tr. 37-59.
7. Tr. 76-77.
8. Tr. 61-67.
9. Tr. 60.

Judgment was filed on September 28, 1966.[10] Notice was served upon appellant on October 14, 1966.[11]

Appellant did not then attack the judgment. And he has never appealed from it.

FDIC then filed and served its cost bill against appellant on October 21, 1966.[12]

Appellant took no action after receiving the cost bill.

On October 31, 1966, the District Court ordered appellant to appear and answer concerning his property.[13] This was served on appellant on November 7. The hearing was set for November 28.

On November 22 appellant filed his motion for relief from the judgment.[14] On the same date appellant obtained an ex parte order staying the hearing which had been set for the 28th of November.[15] These documents were the *first* papers he ever filed in this action. That first filing was over one year after the case began, was nearly two months after the entry of judgment, and was just six days before the scheduled property hearing.

After briefing, the District Court denied appellant's motion to set aside the judgment.[16]

Appellant appeals from this denial.[17] We will show that the District Court's denial was a proper exercise of its discretion.

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10. Tr. 68.
11. Tr. 116.
12. Tr. 69-70.
13. Tr. 73-74.
14. Tr. 76.
15. Tr. 85.
16. Tr. 102.
17. Tr. 108.

THE ORDER OF THE DISTRICT COURT CANNOT BE REVERSED EXCEPT FOR AN ABUSE OF DISCRETION

Appellant did not appeal from the judgment. Rather, he attacked the judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[18] He did so on the ground of inadvertence and excusable neglect.[19] The law is clear that a motion under Rule 60(b) is directed to the *discretion* of the District Court. Discretion is particularly important here, because the asserted ground for attacking the judgment was not a legal matter, but a factual matter (i.e., inadvertence and excusable neglect). The District Court's exercise of discretion cannot be reversed except for an abuse of that discretion.

This Court has frequently stated that the District Court's denial of relief from a judgment will not be reversed unless there is an abuse of discretion.

For example, in *Siberell v. United States,* 268 F.2d 61 (9th Cir. 1959), a motion to vacate a portion of the judgment in the District Court was denied. The denial was affirmed on appeal by this Court, stating on page 62:

> "It is well settled that a motion to vacate a judgment is addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for an abuse of discretion."

Accord, *Kolstad v. United States,* 262 F.2d 839 (9th Cir. 1959); *Independence Lead Mines Company v. Kingsbury,* 175 F.2d 983 (9th Cir. 1949); *Stafford v. Russell,* 220 F.2d 853 (9th Cir. 1955); *Perrin v. Aluminum Company of America,* 197 F.2d 254 (9th Cir. 1952); *Cole v. Fairview Development,* 226 F.2d 175 (9th Cir. 1955).

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18. Tr. 76.
19. Tr. 76-77.

In *Smith v. Stone,* 308 F.2d 15 (9th Cir. 1962), this Court considered proceedings similar to the present case. Appellant had failed to oppose a summary judgment which was entered against him. The District Court then denied appellant's motion under Rule 60(b) to set aside the judgment on the ground of inadvertence. The denial was affirmed on appeal, and this Court again stated its support for the discretionary power of the District Court. Because of its appropriateness to this appeal, we will quote the opinion extensively (pages 17-18):

> "We consider then, as the only matter before us, the refusal of the trial court to set aside the final judgment. We are met with the general rule, agreed to by appellant that whether there exists a sufficient showing of inadevertence or excusable neglect *is purely a matter of discretion with the trial court* . . .
>
> "The court below properly, in the exercise of its *judicial discretion,* granted the [summary judgment] motions before it. There was no opposition, either in writing or orally to the facts presented by appellees. Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result . . .
>
> "Finding no error, we do not reach a consideration of the merits of appellant's claim. *We find no abuse of discretion in the trial court's refusal to reopen.*" (Emphasis added)

THERE WAS NO ABUSE OF DISCRETION

The District Court correctly exercised its discretion in denying appellant's motion to attack the judgment.

The discretion was properly exercised because appellant had taken no steps to defend this litigation until after judgment was entered:

Appellant has never answered the complaint.

Appellant filed no opposition to the motion for summary judgment.

Appellant made no response to the order granting the summary judgment.

Appellant made no reply to the proposed form of judgment or to the affidavit for attorneys' fees.

Appellant made no response to the notice of the judgment.

Appellant made no response to the cost bill.

And appellant filed no appeal from the judgment.

Not until just six days before the scheduled property examination did appellant file his first piece of paper in this suit. This was over one year after the action had been pending against him, and nearly two months after the judgment.

Throughout the course of the litigation appellant simply ignored all of the process served upon him.

The District Court was within its discretion in denying appellant's attack on the judgment when appellant had so completely ignored the litigation. The language of this Court in *Smith v. Stone* is particularly appropriate (page 18):

> "The court below properly, in the exercise of its judicial discretion, granted the [summary judgment] motions before it. There was no opposition, either in writing or orally, to the facts presented by appellees. Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result."

APPELLANT HAS SHOWN NO ABUSE OF DISCRETION

We will now reply to appellant's asserted reasons for attacking the judgment. We will show that they are not

sufficient to set the judgment aside, much less to show an abuse of discretion in refusing to set it aside.

Appellant argues that there is an abuse of discretion because of the large size of the judgment.[20] The size of the judgment should come as no surprise to appellant. He signed continuing guaranties in those amounts.[21] The complaint and the prayer against him asked for judgment in that amount.[22] And the motion for summary judgment asked for judgment against him in that amount.[23] If appellant were concerned by the sum involved, he should have expressed his concern by defending the case, not by complaining after the judgment was entered. In *Smith v. Stone* this Court rejected counsel's argument that because of the importance of the case he should be excused for his failure to oppose the summary judgment motion. As the Court stated (page 18):

> "Counsel for appellant then states because this is an important case, he should be excused for his failure to file opposition to the motion to dismiss, and for summary judgment . . .
>
> "Counsel for litigants no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result."

Appellant argues that there is an abuse of discretion because he has a "sufficient defense."[24] The defense which appellant would assert is apparently the statements made in the last two paragraphs on page 7 of his brief and the letter on page 8.

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20. Appellant's brief, page 9.
21. Tr. 21, 22, 52, 53.
22. Tr. 12-14.
23. Tr. 37-59.
24. Appellant's brief, page 9.

FDIC denies that those matters would constitute a defense. But there is no need to burden the Court with a discussion. The reason is that this "defense" was not presented to the District Court in this case. It was not presented in any answer to the complaint or to the summary judgment motion, and it was not presented in appellant's motion to set aside the judgment.

In this regard we disagree with two statements made by appellant. On page 2 of his brief, appellant states: "The existence of the obligation was denied by Bennett . . ." And on page 9 appellant says that the correspondence was filed with the court below. Appellant errs. He filed no answer to the complaint. And he made no opposition to the motion for summary judgment. And in his motion to set aside the judgment there is nothing denying the obligation and no filing of the alleged letter on page 8 of appellant's brief.[25] These matters are being raised in this case for the first time in this appeal. They were not presented to the District Court.

On page 7 of his brief appellant makes an argument based on other cases in which appellant is engaged. An alleged defense in another case is not relevant to this case. The simple answer is that if appellant thought that his defense in the other case were valid here, he should have asserted it either by answer or by opposition to the summary judgment motion. Again, as stated by this Court in *Smith v. Stone* (page 18):

> "Counsel for appellant here urges, as he urged below in his motion to set aside, that he has a good case but that the court below believes there is no merit in the case. He also urges that in other cases he has proved right by a victory in the Supreme Court, after trial judges had no faith in his position. Neither argument

25. Tr. 75-86.

> aids his position here. Neither fact, if true, excuses his failure to follow ordinary court procedures and rules in this case."

Finally, we must consider appellant's argument to the District Court. His motion was based upon inadvertence. The inadvertence involved the state of mind of appellant's counsel.[26] And in turn, that state of mind pertained to an alleged agreement for a moratorium. In this appeal, appellant has made no direct reference to inadvertence or state of mind. However, because his brief cites certain correspondence on which he argued his alleged state of mind to the District Court, FDIC feels compelled to reply.

The issues of alleged agreement, state of mind, and inadvertence were matters of fact for the District Court. The Dictrict Court ruled against appellant. And there is substantial evidence to support this ruling by the District Court. An affidavit was filed by the attorneys for FDIC in opposition to appellant's motion. The affidavit stated specifically:[27]

> "there was no assurance given by the undersigned to William S. Bennett or to James Martin MacInnis, his attorney, that pending actions with appropriate notice would not be prosecuted against William S. Bennett . . ."

Since this affidavit is in the record and since the District Court ruled on this matter of fact against appellant, appellant cannot show any abuse of discretion.

Even further, appellant's own correspondence shows that there was no agreement. The letter of August 23, 1966[28] is

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26. Tr. 76-79.
27. Tr. 99, lines 27-30.
28. Tr. 81.

not an agreement. It is simply an offer by appellant for an agreement. And the offer was never accepted by FDIC. Such a unilateral offer certainly cannot bind FDIC. Further, it should be noted that this letter was not sent until almost a month after the motion for summary judgment had been served upon appellant. But the letter made no reference to the motion for summary judgment. Nor was any oral reference made to the pending summary judgment motion. As stated in FDIC's affidavit:[29]

> "at the time of the meeting with Mr. William S. Bennett and James Martin MacInnis on August 11, 1966, with reference to the proposed moratorium, no mention was made by Messrs. Bennett and MacInnis with reference to the pending motion for summary judgment in the above entitled action . . ."

That affidavit[30] also states that the September 21, 1966[31] letter was received without any mention of the proceedings in this case. By that date appellant had already been served with the order granting the summary judgment, the proposed form of judgment, and the affidavit for attorneys' fees.

Nothing in appellant's letters would relieve him of his usual obligation to appear in response to process served upon him.

At most, FDIC simply advised appellant that it:[32]

> "will not take the default of Mr. Bennett in any proceedings without first having given him notice and adequate time to respond. We will continue to route all these through your office until instructed otherwise."

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29. Tr. 99, lines 6-11.
30. Tr. 99, lines 16-19.
31. Tr. 83.
32. Tr. 84, 98, line 30, to 99, line 2.

The record shows that FDIC gave appellant notice of every step of the proceedings, and gave him more than adequate time to respond. All motion documents went to the office of appellant's counsel.

FDIC's affidavit and appellant's own letters demonstrate that there was no agreement not to prosecute this action against appellant. And both the record and the case law demonstrate that appellant's inadvertence or state of mind does not justify setting aside the judgment.

CONCLUSION

The only issue before this Court is abuse of discretion. The question is not whether this Court, had it been sitting as the District Court, would have set aside the judgment. The only question is whether the District Court abused its discretion in not doing so. Therefore, if there is any basis for supporting the District Court's conclusion, that conclusion must be affirmed.

For over one year appellant took no action to defend the case, although he was represented by counsel. He did not answer the complaint and did not oppose the summary judgment motion. Appellant's consistent ignoring of all process served upon him supports the District Court's exercise of its discretion. With a record of such repeated failures to defend himself, appellant cannot show any basis for setting aside the judgment, much less show an abuse of discretion in not doing so.

It is respectfully submitted that the order of the District Court should be affirmed.

Dated: December 29, 1967.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles A. Legge